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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LUELLA BREEN, ET AL.,

Petitioners,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Where the Secretary of Labor has determined, in an informal rulemaking proceeding, that a 1942 regulation which had prohibited homework in the knitted outerwear industry is no longer necessary to his enforcement of the Fair Labor Standards Act (FLSA):

1. May the Secretary's decision to rescind the regulation -- and thereafter to regulate such homework in the same manner as in most other industries -- based upon his predictive judgment, in light of the absence of available empirical data, regarding his Department's enforcement capabilities, be struck down under the Administrative Procedure Act because the reviewing court disagrees with that predictive judgment?

2. Does the APA require, and does the FLSA authorize, the Secretary to

consider alternative forms of homeworking prohibition, where he has already reasonably concluded that prohibition does not serve the purposes of the FLSA?

Where the only harm alleged by plaintiff labor unions would result from the illegal acts of unnamed third parties who may choose to violate the FLSA by paying subminimum wages:

3. Are plaintiffs' unsupported and speculative allegations that their members will suffer a competitive loss of wages, but not at a level below the minimum wage, sufficient to confer standing to challenge a rulemaking which does not alter the FLSA proscription against subminimum wage payments?

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners[1] respectfully pray that

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1 This petition is filed on behalf of Luella Breen, Cecile Duffany, Mary Hon, and Linda Guetti, present or former homeworkers in the knitted outerwear industry, who were defendant-intervenors below. Respondents, plaintiffs below, are the International Ladies' Garment

a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on November 29, 1983, following the opinion of that Court entered on the same date. The opinion declared that the decision of the Secretary of Labor, rescinding a regulatory prohibition against the employment of homeworkers in the knitted outerwear industry, was arbitrary and capricious.

OPINIONS BELOW

The opinion of the United States

Footnote Continued

Workers' Union, and other unions, manufacturers, and manufacturers' associations in the garment industry, and state labor officials in New York and California. A complete listing of plaintiff-respondents appears as Exhibit A, appended to this petition.

Court of Appeals for the District of Columbia Circuit, dated November 29, 1983, is reported at 722 F. 2d 795 (D.C. Cir. 1983). Appendix, 1. The opinion of the United States District Court for the District of Columbia, dated July 23, 1982, is not reported. Appendix, 67.

JURISDICTION

Respondents brought this action in the United States District Court for the District of Columbia seeking a declaration that the Secretary of Labor acted arbitrarily and capriciously in rescinding the homeworker ban. Appendix, 104. On cross-motions for summary judgment, the District Court found that plaintiffs had standing to sue, and upheld the rulemaking. The United States Court of Appeals for the

District of Columbia Circuit, on appeal, then vacated the Secretary's rescission of the regulation. Petitioners here, defendant-intervenors below, petitioned for rehearing or for rehearing en banc. Both requests were denied on February 1, 1984, and on February 29, 1984, the judgment of the Court of Appeals was conveyed to the District Court. Appendix, 66.

This petition is being filed within 90 days of the date of denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article III, Section 2, of the United States Constitution:

> The judicial Power shall

> extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and ....to controversies to which the United States shall be a party....

Pertinent portions of the Fair Labor Standards Act, 29 U.S.C. §§202 and 211(d), and the Administrative Procedure Act, 5 U.S.C. §§553(c), 702, and 706(2)(A), appear as Exhibit B, appended to the petition. Pertinent portions of the Labor Department regulations adopted pursuant to the Fair Labor Standards Act, 29 CFR Part 530, are reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioners, homeknitters in rural Vermont, seek review of the judgment of the United States Court of Appeals, Appendix, 65, vacating a Labor Department

informal rulemaking that had permitted homeworking employment in the knitted outerwear industry, rescinding a regulation promulgated in 1942 which had prohibited such work.

While "homework" has always been legal in every other industry, although regulated by the Department of Labor to ensure compliance with the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201, et seq., the Secretary of Labor in the early 1940's banned homework with respect to the knitted outerwear trade and six other industries.[2] 29 CFR §§530.1, 530.2. The

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[2] The seven "restricted" industries -- in which homeworking is, with only rare exceptions, 29 CFR §§530.2, 530.4, prohibited -- are as follows: knitted outerwear, women's apparel, jewelry, gloves and mittens, buttons and buckles, handkerchiefs, and embroideries. 29 CFR Part 530; Appendix, 146. No industries have been added to or removed from this listing, other than by the 1981

homework prohibition was effected pursuant to specific authority granted to the Secretary under the FLSA. See, Gemsco v. Walling, 324 U.S. 244, 269 (1945). That authority extends only to such restrictions or prohibitions "as are necessary or appropriate" to prevent the circumvention or evasion of the minimum wage rate prescribed by the Act. 29 U.S.C. §211(d).

On December 5, 1980, the Department announced hearings to determine whether the homework prohibition was still "necessary or appropriate" to safeguard the minimum wage. 45 Fed. Reg. 80555 (Dec. 5, 1980), Appendix, 157. Following public hearings, the Department on May 5,

Footnote Continued

rulemaking at issue herein, which removed only the knitted outerwear industry.

1981, published a proposal to lift the homework ban in all seven of the restricted industries. 46 Fed. Reg. 25108 (May 5, 1981), Appendix, 161. The Notice referenced the purpose of the rulemaking:

> to determine if Regulations 29 CFR Part 530 -- Employment of Homeworkers in certain industries, are still necessary or appropriate to safeguard the minimum wage rate..., and whether there is need to change the Regulations to take into account changes in economic conditions which have occurred since the homework Regulations were promulgated.

46 Fed. Reg. at 25108, Appendix 161. The proposed rulemaking was based in part on testimony which "raised serious questions as to the effectiveness of the Regulations in protecting workers." 46 Fed. Reg. at 25109, Appendix, 165. The Department concluded:

> To the extent that minimum wage and overtime violations presently exist in the seven restricted industries,... elimination of the Regulations would make it more likely that homeworkers employed in these industries would report such violations without fear of losing their employment.

Id., Appendix, 165.

On October 9, 1981, after two previous notices in the Federal Register, four days of public hearings, and review of over 10,000 comments, the Secretary of Labor published a Final Rule removing the regulatory prohibition against homeworking in only one of the seven restricted industries -- the knitted outerwear industry. 46 Fed. Reg. 50348 (Oct. 9, 1981), Appendix, 167. As a result, homeworking employment in that industry was placed on the same footing as almost every other -- it was to be

regulated, rather than prohibited. In the six other restricted industries, however, the homework employment prohibition remains in effect.

The Final Rule was based upon testimony that homeworkers in the knitted outerwear industry are paid in excess of the minimum wage; upon the absence of "adequate substantiating evidence" that removal of the restriction would result in significant harm to factory employees in the industry; upon evidence demonstrating that "substantial curtailment of employment opportunities and earning power" would result from a continuation of the restriction; and upon a specific finding that "an effective enforcement program [ensuring payment of the minimum wage] is feasible." 46 Fed.

Reg. at 50348-50349, Appendix, 171-173.

The conclusion that a program for enforcing the minimum wage is feasible -- the issue at the very crux of the instant litigation -- was in turn supported by a new "concerted compliance effort," and a finding that homeworkers are expected to comprise only a small percentage of the employees in the industry. The Secretary distinguished the current state of enforcement feasibility from that in 1942, when the restriction was first imposed. Forty years ago effective enforcement was not deemed possible because homeworkers comprised an estimated 20 percent of the workforce, because the Department's enforcement program was newly established, and because acceptance of the principle of a

national minimum wage, then only recently created by the 1938 statute, was far less prevalent than today. 46 Fed. Reg. at 50349, Appendix, 173.

The Final Rule also emphasized the experimental nature of the Secretary's approach, specifically stating that if significant minimum wage or other violations were found to be widespread among homeworkers, the Secretary would consider reimposing the restriction. Conversely, if specific evidence were found to support the removal of the prohibition, the Secretary would consider its removal in the six remaining restricted industries. Id., Appendix, 173-74.

The International Ladies' Garment Workers' Union (ILGWU) and others brought

suit in the U.S. District Court for the District of Columbia, challenging both the authority of the Secretary to remove the prohibition, and also the correctness of his decision to have done so. The Court allowed the petitioners here to intervene as defendants, and granted summary judgment for the defendants. Appendix, 103. Although the plaintiffs were held to have standing to sue, the Court concluded that the Secretary did have authority to lift the prohibition, and that his action was properly supported by the record, agency experience, and his own discretionary judgment, and was rationally based and procedurally correct.

On appeal the Court of Appeals for the District of Columbia reversed,

holding that the decision of the Secretary was arbitrary and capricious for three separate and independent reasons. Appendix, 43, n. 43. The Court found that the Final Rule failed to evidence the Secretary's consideration of all "common and known or otherwise reasonable options" to the complete rescission of the homeworking ban, Appendix, 43; that his conclusion regarding the feasibility of an effective enforcement program was "unreasoned," Id.; and that he failed to give adequate consideration to whether resultant employment benefits to homeworkers might be offset by "employment losses and reductions in the earning power of factory workers." Appendix, 60-61. The case was remanded to the District Court

with instructions to return the matter to the Secretary for further proceedings.[3]

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[3] The subsequent history of the dispute is also of some interest. After the decision of the Court of Appeals, the Secretary on March 27, 1984, published two items: a new Notice of Proposed Rule, similar to the one at issue herein, proposing to remove the homeworking prohibition as to the knitted outerwear industry alone, 49 Fed. Reg. 11786 (March 27, 1984); and an Emergency Rule, pursuant to 5 U.S.C. §§553(b)(B) and 553(d)(3), immediately authorizing homework in the industry for a period of 120 days for those persons engaged in homeworking after the 1981 rescission. 49 Fed. Reg. 11792 (March 27, 1984). The emergency measure has again been challenged by the ILGWU as a violation of the Court of Appeals mandate in the instant litigation. Following the District Court's denial of injunctive relief on April 11, 1984, the matter is now before the Court of Appeals.

Despite the new rulemaking, the petition for certiorari has by no means been mooted. For reasons similar to those relied upon by this Court in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 535 n. 14 (1978), there remains a very real case or controversy before this Court. The outcome

Footnote Continued

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of the rulemaking itself is not certain, and of even greater consequence is the continuing impact of the Court of Appeals ruling on this matter. Throughout the inevitable future litigation over the Final Rule, Plaintiff/Respondents ILGWU, et al., will be held to have standing to sue, and the Secretary of Labor will be required to satisfy the Court's demands on the issues of enforcement feasibility, consideration of alternatives, and consideration of the earning capacity of factory workers. Petitioners argue, infra, that on the first point the Court has imposed too great a standard on the Secretary, and on the second and third it has entirely created standards neither called for in, nor indeed consistent with, the Fair Labor Standards Act and Administrative Procedure Act.

The questions raised are of particular significance, given that the Court of Appeals for the District of Columbia Circuit is the venue for the great majority of cases challenging administrative agency action. Its broad grant of standing to sue under the APA in this case; its extension of the alternatives review requirement set forth in such carefully limited fashion by this Court in Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Company, ___ U.S. ___, 103 S. Ct. 2856 (1983); its exceedingly restrictive view of an agency's power to

Footnote Continued

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determine its own enforcement capabilities and to alter its methods accordingly; and its novel reading into the FLSA of a balancing test for economic impacts on factory versus home workers, will hereafter serve as far-reaching precedent for judicial review of agency actions. The importance of these issues argues strongly in favor of this Court's determination of the continuing "case or controversy" which is presented.

MEANING OF THE DECISION BELOW

The decision below thus defeats a policy choice made by the Secretary of Labor to modify the enforcement technique utilized in a single industry, from that of outright prohibition to that of regulation, the mechanism considered reasonable and appropriate as applied to almost every other industry. Thus, in the face of the outdated nature of the 40-year-old regulation at issue, evidence in the agency record supporting the Secretary's policy choice, the conscious decision of the Secretary to couple removal of the prohibition with an increased enforcement effort, and the declaration that the regulatory change is to be considered experimental, the Court of Appeals substitutes its preference in

an area of agency discretion for that of the Secretary.

The FLSA is thereby re-written to defy the express limitations of §211(d) placed by Congress upon the authority of the Secretary to prohibit homeworking, and to remove from the Secretary considerable latitude in determining enforcement policy for his agency. The Administrative Procedure Act is likewise re-written to engraft upon the rulemaking process a more rigorous requirement of alternatives review appropriate to agency decisions under such statutes as the National Environmental Policy Act, 42 U.S.C.S. §4321, et seq., where the substantive statute itself demands it. And the requirements of standing under Article III and related prudential

considerations are re-written to extend jurisdiction to cases in which the injury claimed by plaintiffs is not only speculative, but is also caused only by the independent and illegal conduct of third parties not before the Court.

The decision below, because of its mis-application of the law, and of this Court's rulings in Valley Forge Christian College v. Americans United for a Separation of Church and State, 454 U.S. 464 (1982), and in Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co., ___ U.S. ___, 103 S. Ct. 2856 (1983), threatens very real and practical ramifications for all future federal administrative actions, and for the jurisdiction and scope of review of federal courts. For

administrative agencies which choose to reexamine existing regulations and to determine appropriate enforcement strategies for the 1980's, the decision establishes a presumption in favor of existing rules as both a factual and judgmental benchmark which current administrators must overcome before outdated rules can be modified or eliminated.

The administrative dilemma created by the decision below is exemplified in the case itself. Because the homeworking prohibition has been in effect for forty years, it would not be possible -- in the absence of the very sort of experimental program proposed by the Secretary here and struck down by the Court of Appeals -- to satisfy the data requirement

imposed by the Court, and to overcome the presumption in favor of the 1942 regulation.

ARGUMENT

I. PLAINTIFF-RESPONDENTS LACK STANDING TO CHALLENGE THE SECRETARY'S ACTION

The power conferred by the Constitution upon the federal judiciary is not an unconditional authority to declare the rights of individuals. A federal court's power may be exercised only when necessary to determine a "real, earnest and vital controversy" and even in that instance only as a means of last resort. Chicago & Grand Trunk Railway Co. v. Wellman, 143 U.S. 339, 345 (1892).

Such a limitation upon the power of the federal judiciary was drawn in part as an acknowledgment of the proper role of the judicial branch in the constitutional

structure, because the exercise of that power inevitably affects relationships between coequal branches of the national government. Warth v. Seldin, 422 U.S. 490, 498 (1975). A federal court may not, therefore, entertain a claim that another branch has conducted itself improperly, unless the claimant's interests are so affected as to entitle that claimant to raise it. Blair v. United States, 250 U.S. 273, 279 (1919).

This concept of judicial self-restraint, constitutionally expressed through the "cases and controversy" requirement of Article III, and supplemented by various prudential considerations, has found voice in the development of the standing doctrine, reviewed recently by this Court in Valley

Forge Christian College v. Americans United for a Separation of Church and State, 454 U.S. 464 (1982). The Court articulated the conditions which under Article III must be present in order for federal court jurisdiction to be invoked. The plaintiff must demonstrate: (1) that he personally has suffered some actual or threatened injury as a result of defendant's putatively illegal conduct; (2) that said injury can fairly be traced to the challenged action; and (3) that the alleged injury is likely to be redressed by a favorable decision of the court. Id., 454 U.S. at 472-73. Federal courts have also imposed further prudential limitations upon the exercise of their power, including the requirement that the plaintiff's complaint must fall within the

zone of interests intended to be protected by the statute under which suit is brought. Data Processing Service v. Camp, 397 U.S. 150, 153 (1970).

A. ILGWU Fails to Demonstrate the Necessary Connection Between the Defendant and The Alleged Injury.

The standing of plaintiff-respondents, ILGWU, et al., ("ILGWU"), in this matter rests entirely upon a causal connection between the contested rulemaking and the alleged injury to ILGWU which is far too distant, slight, and speculative to warrant federal court jurisdiction. The amended complaint offers a Rube Goldberg-like vision of the labor market, where a limited rulemaking which simply removes a ban on homeworking, through some series of leaps

of both faith and logic, becomes a loss of jobs and earning capacity to persons not even encompassed by the rulemaking which is at issue. Appendix, 104, 126-130.

The Court of Appeals, by misconstruing the nature of the rule itself, has eliminated most of the necessary intervening links between the rulemaking and the alleged injury to ILGWU. According to the Court:

> In contrast [to cases holding plaintiffs' claim based upon the independent actions of third parties to be too speculative], the relief sought by appellants would make the injurious conduct of third parties complained of in this case illegal;...

Appendix, 28 (emphasis supplied). Such is simply not the case. The injurious conduct complained of -- the payment by

third parties of subminimum wages -- always has been, and would clearly remain under the final rule, illegal. Far from removing the illegality of subminimum wage payments, the Secretary declares in his Notice an intensified enforcement effort as to homeworkers in the knitted outerwear industry.

Article III demands a more direct nexus between the action complained of and the injury alleged, a requisite link which has been previously expressed in terms of a "but-for" test. See, Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 74-75 (1978). In order to establish standing, therefore, ILGWU must at a minimum demonstrate that, "but for" the removal of the prohibition on homework in the knitted outerwear

industry, subminimum wage payments to homeworkers would not be made. The flaw in this contention, however, is that it omits a necessary link in the chain of causation. The direct result of the removal of the prohibition on homework by the Secretary is not payment of subminimum wages, but rather employment of homeworkers. It is only the independent and illegal action of third parties -- homeworker employers who may choose to violate the FLSA -- which will result in subminimum wage payments.[4]

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[4] In fact, the final rule and the agency record suggest that the Court of Appeals ruling may have the opposite effect from that intended, by inhibiting the reporting of illegal subminimum wage payments to homeworkers. See, Notice of Proposed Rulemaking, Appendix, 165. Such violations, even despite the homework prohibition, were at least alleged, in the Labor Department's action against C.B. Sports, Inc., although they were never proved or admitted. Both the

[A] federal court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976). The injury alleged by ILGWU can be traced only to such third parties, and does not fairly follow from the rulemaking at issue.[5]

An examination of the rationale of

Footnote Continued

illegality and the Department's duty to respond have long pre-existed the rulemaking, and remain wholly unaffected by it.

[5] The Court of Appeals itself characterized violation of the law by payment of subminimum wage as an "extraordinary measure," and therefore not within the realm of reasonable actions for which a party must account when seeking standing. Appendix, 28.

the Court of Appeals from a different perspective underscores the same defect. The standing doctrine demands that the injury alleged be redressable by the relief sought, else a federal court will serve as little more than a forum for public debate. See, Sierra Club v. Morton, 405 U.S. 727, 740 (1972). Judicial invalidation of the final rule, which itself in no manner alters the illegality of subminimum wage payments, will in no sense prevent such illegal actions by independent third parties. In the absence of the necessary causal link between rulemaking and injury, the Court is powerless to do anything but illegitimize even those homeworkers and their employers who would operate within the bounds of the FLSA. Since the relief

requested cannot redress the injury alleged, ILGWU must be found to lack standing to invoke federal jurisdiction. Valley Forge, 454 U.S. at 472.

B. The Injury Alleged by ILGWU Does Not Lie Within the Zone of Interests Intended to Be Protected by the Fair Labor Standards Act.

The Court of Appeals summarily "reject[s] the suggestion that the manufacturers, manufacturers' associations and labor organizations do not satisfy the zone of interests test in this case," Appendix, 25, based only upon a previous determination that compliant employers have a cause of action under §10 of the APA. 5 U.S.C. §702 (1982). Appendix, 16-24. Plaintiffs who are state labor officials, labor unions and manufacturer associations, however, are

in far too attenuated a posture relative to the statutory scheme constructed by the FLSA to satisfy the prerequisites for standing.

The purpose of the FLSA is to protect both employees who are paid subminimum wages, and also employers who are competitively disadvantaged because of such payments. 29 U.S.C. §202. The statute authorizes only employees who are being paid subminimum wages themselves, or the Secretary acting in their behalf, to bring an enforcement action. 29 U.S.C. §216(b), (c). Thus, as a threshold matter, ILGWU and its co-plaintiffs are not authorized to enforce the rights of homeworkers who allegedly will be paid subminimum wages.

To the extent that ILGWU alleges

that union members will suffer "reductions in their wages and other terms and conditions of employment", Appendix, 127, such claims also fall outside the zone of interests protected by the statute. The FLSA guarantees that a minimum standard will be upheld; it does not guarantee, nor does it authorize enforcement of, any labor conditions beyond that minimum standard. 29 U.S.C. §202(a). It is nowhere alleged that factory employees will be paid any less than the minimum wage, merely that their wages will be reduced because of competitive market forces. Such injury, whether real or imagined, is neither contemplated by, nor sufficient for standing under, the FLSA. The FLSA is similarly unconcerned with the alleged

effect on the unions' organizing ability, Appendix, 128, and with the other injuries alleged by the plaintiffs herein. Appendix, 128-30.

II. THE SECRETARY ENGAGED IN REASONED DECISION-MAKING IN COMPLIANCE WITH THE APA

The Court of Appeals identified three independent[6] bases for its decision: (1) the record failed to support the Secretary's conclusion regarding the feasibility of an effective program to enforce the FLSA among

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[6] While the Court found the failure adequately to consider alternatives to be the clearest basis for reversal, it also held as independent justifications its conclusions regarding enforcement feasibility and the curtailment of employment opportunity. Appendix, 43, n. 43. The precedent established by this case, then, would hold any one of the Court's reasons sufficient to overturn agency action.

homeworkers in the knitted outerwear industry; (2) the Final Notice failed to adequately address certain alternatives to rescission of the homeworking ban; and (3) the Secretary failed to consider the detriment to the employment opportunity and earning power of factory workers from removal of the prohibition. Petitioners submit that on each count the Court of Appeals erred in its application of the relevant law, and established a new and wholly unauthorized standard for judicial review of an informal agency rulemaking.

A. Where There is a Rational Basis for Rescission, a Reviewing Court May Not Accord to an Existing Regulation a Presumption of Validity Which Must be Overcome By the Agency.

The Court of Appeals correctly articulated the "arbitrary and

capricious" standard of review for informal notice-and-comment rulemaking under the Administrative Procedure Act. 5 U.S.C. §706(2)(A). In actuality, however, it held the Secretary to a far more rigorous test than that required by law. This Court has previously rejected an attempt to intensify the scope of review of agency action based upon a reviewing court's reading of certain "legislative acts and non-acts." Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co., ___ U.S. ___, 103 S. Ct. 2856, 2867 (1983). There, even an "unequivocal ratification" of an agency regulation by Congress was held not to alter the "arbitrary and capricious" standard of review of a later agency decision to

rescind the regulation. Id. 103 S. Ct. at 2868. By the same token, an agency decision to revoke a regulation may not be reviewed under a more stringent standard simply because of a previous administrative action -- viz., a prior administrator's decision to have promulgated the regulation in the first place. Such is the basis underlying the Court's heightened scrutiny of the Secretary of Labor.

The Court of Appeals has accorded a presumption of validity to the administrative decision made in 1942 to adopt the homework prohibition. Seizing upon language in Motor Vehicle Manufacturers Association, 103 S. Ct. at 2866, the Court applies the presumption in an evidentiary sense, requiring the

Secretary to carry a burden of proof sufficient to overcome the presumption. The entire factual and judgmental benchmark against which the Court measures the Secretary's 1981 decision is another administrator's policy choice made forty years previously. ("We do not believe that the Secretary was free to ignore the specific impediments identified in the 1942 findings,..." Appendix, 60)

Any presumption properly accorded is, however, only against policy changes that "are not justified by the rulemaking record." Motor Vehicle Manufacturers Association, 103 S. Ct. at 2866. Where justification does exist, as measured only by the rational basis standard of the APA, a reviewing Court may not employ an outdated administrative policy

decision as a barrier to regulatory change. To do so would be to inhibit agencies' necessary latitude to "adapt their rules and policies to the demands of changing circumstances." Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968).

B. The Agency's Predictive Judgment as to its Own Enforcement Capabilities Is Adequately Supported in the Record, and May Not Be Struck Down Because of the Absence of Specific Data.

An administrative agency, in order to respond to the need for expertise and specialization in a complex society, must be permitted to exercise its delegated discretion supported by experience without undue restrictions. See, SEC v. Chenery Corp., 322 U.S. 194, 209 (1947). Consequently, not only must "a reviewing

court...be most hesitant to intrude" upon an area reserved to an agency's expertise, Motor Vehicles Manufacturers Association, 103 S. Ct. at 2872, but also the judgment of an administrator may not be overturned simply because a reviewing court would reach a different conclusion. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

It is, moreover, a truism that in many instances an agency will not be able to anticipate with complete certainty the full effects of its policy choices. Thus, this Court has "recogniz[ed] that policymaking in a complex society must account for uncertainty." Motor Vehicles Manufacturers Association, 103 S. Ct. at 2871. When reconsideration of past policy options results in "substantial

uncertainty" that a regulation currently continues to accomplish its intended statutory purpose, and such uncertainty is supported by the record and reasonably explained, then the agency must be free to alter or revoke that regulatory standard.

> It is not infrequent that the available data does not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.

Id. And see, FCC v. WNCN Listeners Guild, 450 U.S. 582, 594-95 (1981). Conclusions, particularly in the area of regulatory policy, often require "forecast[s] of the direction in which future public interest lies [and] necessarily involves deductions based on the expert knowledge of the agency."

Those deductions are deserving of a reviewing court's deference. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978), quoting, FPC v. Transcontinental Pipe Line Corp., 365 U.S. 1, 29 (1961).

The Court of Appeals herein evinces an unwillingness to recognize that circumstances in the nation's labor markets do change over time, and that the Secretary of Labor has been granted authority by Congress to respond to such changes. As a result, the Court required the Secretary to in some manner duplicate or repudiate the studies of the early 1940's which led to the original prohibition.[7] In 1940 homeworking in the

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[7] Based on the 1942 findings, the Appeals Court faults the Secretary's estimate of the projected homeworker population, the failure to articulate

knitted outerwear industry was commonplace and constituted a significant portion of the industry workforce. Appendix, 173. In 1981, by contrast, such homeworking had been illegal for over forty years. While there were isolated instances of homeworking in violation of the ban,[8] there was no

Footnote Continued

differences between enforcement in urban and rural areas, and "other impediments to enforcement of the Act which were 'inherent in the homework practice' in 1942." Appendix, 53-60.

[8] Although the Court of Appeals finds some significance in the action against C.B. Sports as support for the 1942 decision, Appendix, 48-49, that litigation more properly argues against the wisdom of the prohibition. C.B. Sports demonstrates two important factors: that despite an absolute prohibition, homeworking in the knitted outerwear industry continued because the need for this type of employment opportunity remained; and that the Department of Labor is well able to enforce the FLSA as to homeworking employees.

history of permissible homework in the industry from which reliable data could be derived concerning the potential number of homeworkers under a system of regulation, the likelihood of minimum wage violations, and the feasibility of a heightened enforcement effort. The Court of Appeals also overlooks the fact that the conclusions arrived at by the Secretary in 1942 were the very type of enforcement policy options -- based on agency discretion and prudent forecasting -- that the Court today condemns.[9]

The decision of the Secretary to remove the homeworking ban was not

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[9] Ironically, the only data considered reliable by the decision below is the information which has been collected as a result of the Labor Department's enforcement actions since 1981, when the prohibition was lifted.

rendered in an evidentiary vacuum. The Labor Department engaged in an open and public rulemaking process, and considered over 10,000 public comments. There was substantial evidence supporting the Secretary's conclusion: an Illinois Department of Labor study, conducted in 1980, which concluded that homeworking prohibitions were discriminatory; an affidavit by Arthur H. Korn, Chief of the Wage and Hour Division's Branch of Special Minimum Wages, that violations of the minimum wage were no more pervasive in restricted than in non-restricted homeworking industries; a 1959 Department of Labor study on homeworking which supported the Secretary's decision to lift the prohibition; and the testimony of a number of individuals who are

homeknitters in Vermont and favor the removal. The Secretary relied also upon such factors as the Department's knowledge and expertise with regard to the general level of acceptance of the minimum wage throughout the nation's labor markets, his own authority to control the agency's enforcement efforts, and undoubtedly also upon the agency's enforcement experience with homework in all other regulated industries. He initiated a new and concentrated enforcement program in conjunction with the rulemaking, and specifically characterized the new regulatory regime as experimental in nature. Should it ultimately compromise his responsibilities under the Fair Labor Standards Act, the Secretary affirmed that the ban

would be reimposed. Appendix, 173.

Rather than acknowledging the probative value of this evidence as adequate support for the Secretary's decision, and deferring to his expertise, judgment and discretion in accordance with the mandate of Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), the Court of Appeals substitutes its own judgment and interpretation of the evidence relied upon by the Secretary. It then applies its more rigorous "presumption" standard to conclude that the absence of current supporting data as reliable and persuasive as the 1942 report requires the rule to be struck down. In so doing, the Court evidenced a misguided view of the requirements of the APA, and has

intruded its own substantive judgment into an area properly left to an agency's expertise.

C. An Agency Rulemaking Need Not Consider Policy Alternatives Which Do Not Further the Statutory Purpose.

The primary basis for the decision of the Court of Appeals -- and one again held to be independent of the other rationales cited, Appendix, 43 n. 43 -- was the Secretary's failure to consider, and to explain his rejection of, alternatives to the complete removal of the prohibition. The Court cites as support for this conclusion Motor Vehicle Manufacturers Association, 103 S. Ct. 2856 (1983). In so doing, however, it has improperly construed the application of that precedent and, as a consequence,

has expanded the role of a reviewing court far beyond that contemplated by this Court and by the APA.

The range of alternatives which the Secretary should, according to the Court of Appeals, have considered is by no means clear. While the discussion primarily addresses two "possible choices [which] were identified in the Department's Notice," Appendix, 37, the Court apparently would demand more of the Secretary than the consideration of even those two. The Court of Appeals asserts that an agency rulemaking is fatally flawed unless it duly considers, and adequately explains the reasons for rejecting, all "obvious alternatives," Appendix, 40 n. 41, all "obvious and potentially viable alternatives," Id., all alternatives which are not "uncommon

or unknown," Appendix, 41, and all "common and known or otherwise reasonable options." Appendix, 43.

In so holding, the Court of Appeals has erred in two respects. It has, in the first instance, grafted onto the APA a far more extensive requirement of alternatives analysis -- one more appropriate to agency action pursuant to a statute such as the National Environmental Policy Act (NEPA), 42 U.S.C. §4321, which substantively requires consideration of alternatives -- than is properly required of agency action construed under the standard of a "reasoned statement of basis and purpose."

And second, the decision below misinterprets the FLSA in finding the

homework prohibition and its variants, in light of the Secretary's conclusion that the ban is not necessary to enforcement of the minimum wage, to be "narrower options" than the choice made. Appendix, 39 n. 39. Given the FLSA's express limitation, in §211(d), upon the Secretary's authority to prohibit homework, the choice to enforce the statute by regulation is an option significantly more narrow than any version of prohibition. The Court of Appeals would have the Secretary consider alternatives far broader in scope than the option chosen.

The instant case represents the obverse of Motor Vehicles Manufacturers Association, and the Court of Appeals has failed to recognize the distinction.

This Court, careful to narrow the application of its ruling, held that when an agency proposes to rescind a regulation which indisputably furthers the purpose of the substantive statute, its failure first to consider a less far-reaching technological alternative, where the viability of said alternative has not been drawn into question, is arbitrary and capricious. 103 S. Ct. at 2871. Had the agency there reasonably concluded that passive restraints would not result in fewer highway fatalities, its rulemaking clearly would not have been overturned for failure to consider other varieties of passive restraints. The opinion cautions, moreover, that its holding is not to be read as requiring an agency to engage in any specific

procedures or to consider all alternatives, and evinces a particular sensitivity to agency prerogatives on matters of policy. Id. 103 S. Ct. at 2870-71.

In order to reach its decision in the instant case, the Court of Appeals was required to read the holding of Motor Vehicles Manufacturers Association far too expansively. It is now, as a result, the unlikely law of the District of Columbia that an agency may not rescind a regulation which has reasonably been found not to further the statutory purpose, without first considering narrower versions of the unsuitable rule. This result obtains despite the clear limitation placed upon the Secretary's authority to prohibit homework. 29 U.S.C. §211(d). Even where he has

properly found the prohibition to be neither "necessary" nor "appropriate" to the maintenance of the minimum wage, the Court of Appeals would have the Secretary consider lesser forms of prohibition prior to removing the unauthorized regulation. The FLSA, however, in §211(d) precludes the Secretary from adopting any such alternative.

The analysis applied by the Court of Appeals is also far more intrusive than that of the other Circuits. Clearly, an agency decision will not be upheld under the APA where "[t]here are no findings and no analysis...to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion." Id., 103 S. Ct. at 2869, quoting Burlington Truck Lines v. United

States, 371 U.S. 156, 167 (1962) (emphasis supplied). However, it is equally true that the APA requirement of "a concise and general statement of basis and purpose" may not serve as a technical obstacle to strike down agency action. See, Alabama Association of Insurance Agents v. Board of Governors, 533 F. 2d 224, 236 (5th Cir. 1976). This provision "does not require an agency to supply specific and detailed findings and conclusions of the kind customarily associated with formal proceedings." National Nutritional Foods Ass'n v. Weinberger, 512 F. 2d 688, 701 (2d Cir. 1975). The APA was not intended to create obstacles, but rather to facilitate rulemaking, and thus if a reviewing court "can discern the path of the [agency] with sufficient confidence,"

the requirements of the APA have been met. Alabama Association, 533 F. 2d at 237.

In the context of the instant case the agency's path is clearly discernible. As a result of the specific limitation placed upon the Secretary's authority by Congress in §211(d) of the Act, the substantial evidence received in support of rescission, and the deference properly accorded an exercise of agency discretion, particularly on a matter of enforcement policy, it must be concluded that the Secretary acted prudently and correctly. The final rule adequately stated the "basis and purpose" for his decision, and consideration of other alternatives would not have furthered the purpose of the Act.

D. The FLSA Does Not Require or Permit Consideration of the Impact of Rescission on the Earning Capacity, Above the Minimum Wage, of Factory Workers.

The third ground for the Court of Appeals decision again imposes on the Secretary a requirement nowhere present in the FLSA. The Court would apparently have the Secretary apply a balancing test, weighing the employment opportunities for homeworkers resulting from removal of the prohibition against the resultant economic injury to factory workers.[10] Such injury, it was

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10 The Court's analysis of the Secretary's treatment of employment opportunities bespeaks its excessively crabbed reading of the Final Rule. The Court chooses to read unnecessary and unwarranted ambiguity into the Secretary's finding, questioning whether the threatened employment opportunities were the existing illegal positions or anticipated additional opportunities, or

suggested, would take the form of reduced factory wages and employment caused by the competitive impact of homeworkers. By requiring the Secretary to base his decision on "net...employment opportunities," Appendix, 62, the Court has again misconstrued the FLSA, both in its statement of purpose and in the express limitation of §211(d).

It is the declared policy of the FLSA to eliminate "labor conditions

Footnote Continued

whether somehow none were "affected" by the prohibition. Appendix, 61. It is clearly the impact upon both existing illegal positions, brought to light and hence jeopardized in the rulemaking process, and upon potential new positions of homework employment previously inhibited by the ban, which concerned the Secretary. To find fault with his failure to state in explicit terms the obvious is indicative of the Court's unduly critical reading of the Final Rule.

detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. §202(a). The purpose of the Act is to establish and enforce national minimum wage and maximum hour requirements. United States v. Darby, 312 U.S. 100, 109-110 (1941) (and legislative history cited). Beyond the "minimum standard of living" assured by the statute, the Secretary is without authority to determine or otherwise to alter the economic conditions created by a free market economy. He is directed to eliminate substandard labor conditions "as rapidly as practicable...without substantially curtailing employment or earning power." 29 U.S.C. §202(b). And see, Opp Cotton Mills, Inc. v.

Administrator, 312 U.S. 126, 143 (1941).

The homeworking ban was promulgated out of a finding that in 1942 the Department could not ensure payment of the minimum wage to homeworkers. In accordance with the statutory directive of §211(d), therefore, the Secretary was constrained to protect the newly enacted minimum wage, even at the expense of curtailing employment opportunities for homeworkers. Once the Secretary in 1981 reasonably determined that minimum wage enforcement as to homeworkers is today feasible, his authority to prohibit such work is withdrawn. Accommodation of the employment opportunity and earning power of homeworkers was clearly a permissible and appropriate consideration, for it was the action of the Secretary, and not the action of competitive free market forces,

which had in 1942 operated to foreclose employment opportunity from homeworkers.

By contrast, the Court of Appeals would have the Secretary weigh the harm created by this regulatory barrier to homework, now no longer justified by minimum wage enforcement considerations, against a highly speculative harm to ILGWU caused not by agency action, but by competitive economic forces. To the extent that the earning capacity of factory workers may, by the simple competitive impact of forces operating in a free market economy, be reduced, their injury is of no consequence to the responsibilities of the Secretary under the FLSA.

The basic economic theory behind the FLSA also argues against the interpretation of the lower court. An

increase in wages will operate to reduce employment opportunity, a concern manifested by Congress in the legislative history of the FLSA. Thus, the Secretary is required not only to assure a floor for wages, but also to prevent that wage floor from being so high as to substantially limit employment opportunity. §202(b). It is the governmental limitation of employment opportunity with which Congress expressed a concern. It was not the intent of the FLSA to attempt to maximize employment opportunity, or in any way to alter, beyond the minimum wage, the employment level created by the free market. Nowhere is the Secretary delegated the responsibility, or the authority, to decide the maximum number of workers to be employed in any particular industry,

any more than he may decide the maximum wage to be paid in an industry.

The Court would interpret the Act to require the Secretary to prohibit homework for the purpose of maximizing employment opportunity in the knitted outerwear industry. Such a reading of the Secretary's authority would in fact permit, if not require, the Labor Department to exercise far greater governmental control over this nation's economy than Congress certainly intended.

The freedom, within certain necessary and defined limitations, to pursue a chosen vocation without undue governmental restrictions, has long been a fundamental element of our national ideology. The FLSA clearly evidences Congressional respect for this principal, and as a result, imposes explicit

limitations upon the authority of the Secretary to enforce what was in 1938 a far-reaching measure of governmental intrusion into private employment relationships. The Court of Appeals not only reads such limitations entirely out of the Act, but also reads in an even more instrusive suggestion: that the Secretary is empowered, and indeed mandated, to regulate the national labor market so as to maximize employment opportunities. Such an interpretation is without authority under the plain terms of the Act itself, and is clearly contradictory of the regulatory scheme Congress meant to establish.

CONCLUSION

For the reasons stated hereinabove, Petitioners submit that this Court should

grant certiorari to review the decision below.

Respectfully submitted,

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DATE: May 1, 1984

EXHIBIT A

Respondents, appellants below, are the following listed parties:

International Ladies' Garment Workers' Union

Donald Vial, as Director of Industrial Relations for the State of California

Patrick W. Henning, as Labor Commissioner and Chief of the Division of Labor Standards Enforcement of the State of California

Lillian Roberts, as Industrial Commissioner of the State of New York

Amalgamated Clothing and Textile Workers' Union, AFL-CIO

Dalton Industries, Inc.
no parent corporation

subsidiaries, or affiliates:
Columbus Shirt Company
Dalton Sales Corporation
Dalton Imports, Inc.

Knitgoods Workers' Union, Local 155, I.L.G.W.U.

Knitgoods Workers' Union, Local 190, I.L.G.W.U.

Knitted Outerwear Manufacturers' Association, Pennsylvania District

Meyer Manufacturing, Inc.
no parent corporation, subsidiaries, or affiliates

United Knitwear Manufacturers League, Inc.
no parent corporation, subsidiaries, or affiliates

EXHIBIT B

Statutes Involved

Administrative Procedure Act

5 U.S.C. §553(c):

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose....

5 U.S.C. §702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof....

5 U.S.C. §706(2)(A):

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

applicability of the terms of an agency action. The reviewing court shall...(2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law....

Fair Labor Standards Act

29 U.S.C. §202:

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is hereby declared to be the policy of this Act [29 USCS §§201-216, 217-219, 557], through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referenced to in such industries without substantially curtailing employment or earning power.

29 U.S.C. §211(d):

The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act [29 USCS §§201-216, 217-219, 557], and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.